A

Vadivellu a/l Kalimuthu v Rajes a/p Subramaniam

B HIGH COURT (IPOH) — DIVORCE PETITION NO 33–116–03 OF 2014
LEE SWEE SENG J
7 OCTOBER 2014

C *Family Law — Divorce — Consent order made — Husband applied for divorce petition against wife — attempts to reconcile parties by Marriage Tribunal failed — Application for dissolution of marriage — Whether consent order made appealable*

D The petitioner husband had filed a divorce petition against the wife. They lived together in the petitioner's house until January 2013 when the respondent wife moved out. Three attempts to reconcile the parties by the Marriage Tribunal failed. According to the petitioner, the respondent had informed him at the initial stage of their marriage that she was not happy to have married the E petitioner because the marriage had been arranged by both their parents but both parties had tried to work on their marriage. The defining moment came in January 2013 when the wife decided to leave the home and there ensued a quarrel precipitated by financial problems and by what according to the F husband, was the wife's admission that she had another man in her life. Hence, in the present petition, the petitioner husband prayed: that the marriage registered on 13 April 2005 be dissolved; and that the respondent do pay back the petitioner the sum of RM3,000 being the compensation claimed for the petitioner's payment to the temple for the traditional ceremonial solemnisation G of the marriage.

Held:

(1) The parties tried three rounds of reconciliation attempts before the H Marriage Tribunal but had failed to reconcile the parties. Even where one party is adamantly wanting a divorce and another of refusing it, it would not prevent a court hearing the petition to grant a divorce, if satisfied on the facts, that the marriage had irretrievably broken down (see para 17).

(2) The wife had understood the terms of the divorce and had freely I consented to it through the interpretation and explanation of the Tamil interpreter of the court. It did not matter even if she had preferred not to be divorced. The court was also satisfied that proper provision has been made in the monthly maintenance for the wife by the husband and had recorded the sum agreed by both the husband and the wife (see para 19).

(3) As this court had consciously and carefully ascertained that the respondent wife had freely consented to the divorce and that she was not labouring under some erroneous fact or misrepresentation when she consented to the amount of maintenance of RM200 per month and to the return of his gold chain, there was no basis either for setting aside the consent decree nisi or for that matter, an appeal (see para 25).

[Bahasa Malaysia summary

Pempetisyen suami telah memfailkan petisyen penceraian terhadap isteri. Mereka tinggal bersama di dalam rumah pempetisyen sehingga Januari 2013 apabila responden isteri keluar dari rumah. Tiga percubaan untuk pihak-pihak berdamai semula oleh Tribunal Perkahwinan gagal. Mengikut pempetisyen, responden telah memberitahunya pada peringkat awal perkahwinan mereka yang dia tidak bahagia setelah berkahwin dengan pempetisyen kerana perkahwinan tersebut telah diatur oleh kedua-dua ibu bapa mereka tetapi kedua-dua pihak telah mencuba untuk memperbaiki perkahwinan mereka. Saat yang menentukannya adalah pada Januari 2013 apabila responden memutuskan untuk meninggalkan rumah dan terdapat pergaduhan dicetuskan oleh masalah kewangan dan mengikut pempetisyen, pengakuan responden yang dia mempunyai lelaki lain dalam hidupnya. Maka, dalam petisyen ini, pempetisyen memohon: bahawa perkahwinan berdaftar pada 13 April 2005 dibubarkan; dan responden membayar balik pempetisyen sejumlah RM3,000 sebagai pampasan yang dituntut untuk bayaran pempetisyen kepada kuil untuk upacara tradisional perkahwinan tersebut.

Diputuskan:

(1) Pihak-pihak telah tiga kali mencuba untuk berdamai di hadapan Tribunal Perkahwinan tetapi gagal untuk mendamaikan pihak-pihak tersebut. Walaupun satu pihak berkeras mengkehendaki perceraian dan pihak satu lagi menolaknya, ia tidak akan menghalang mahkamah yang mendengar petisyen untuk memberikan perceraian, jika berpuas hati atas fakta, bahawa perkahwinan tersebut tidak dapat diselamatkan lagi (lihat perenggan 17).

(2) Responden memahami syarat perceraian dan dengan bebas bersetuju melalui pentafsiran dan penjelasan jurubahasa Tamil mahkamah. Ia tidak kira walaupun jika dia memilih untuk tidak diceraikan. Mahkamah juga berpuas hati bahawa peruntukan yang wajar telah dibuat dalam penyelenggaraan bulanan untuk responden oleh pempetisyen dan telah merekodkan jumlah yang dipersetujui oleh kedua-dua pempetisyen dan responden (lihat perenggan 19).

(3) Memandangkan mahkamah ini telah dengan sedar dan berhati-hati memastikan responden telah dengan bebas bersetuju kepada perceraian dan bahawa dia tidak bergantung kepada fakta yang salah atau salah

nyata apabila dia bersetuju kepada jumlah penyelenggaraan sebanyak RM200 sebulan dan untuk memulangkan rantai emas pempetisyen, tidak ada asas sama ada untuk mengetepikan dekri nisi persetujuan atau untuk perkara tersebut, rayuan (lihat perenggan 25).]

Notes

For cases on consent order made, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 4065–4068.

Cases referred to

Chen Choy & Son Realty Sdn Bhd v Ganesha Ganapathy & Anor [1987] 2 CLJ 433, HC (refd)
Ganapathy Chettiar v Lum Kum Chum & Ors, Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Gee Siew Yee v Ann Wam Tiang [2008] 1 MLJ 754; [2008] 1 CLJ 229, CA (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761; [1996] 2 CLJ 185, FC (refd)
Liew Wai Kuan v Ong Koh Hou @ Won Kok Fong & Anor [2000] 7 MLJ 241, HC (refd)
Ong Ah Mai v Ling Pooi Ming [1984] 2 MLJ 129 (refd)
Sivanesan v Shymala [1986] 1 MLJ 400, SC (refd)
Tay Hup Lian v Histyle Sdn Bhd & Anor [2010] 9 MLJ 569; [2010] 1 LNS 418, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 52, 53

Aiza Ali Rahman (Legal Aid Bureau, Perak) for the petitioner.
Respondent acted in person.

Lee Swee Seng J:

[1] This is a sad case of an arranged marriage that had failed. While some would believe that it is marriage that makes love, others would say that in this day and age, it is more true to say that it is love that makes marriage and even that is no guarantee that a marriage would survive 'till death do us part.' When what is left of a marriage is just the empty shell of it, one party would eventually petition for a divorce on ground that the marriage has irretrievably broken down and ask for the necessary ancillary reliefs.

PROBLEM

[2] The petitioner husband had filed a divorce petition against the wife. As he was poor and could not afford his own counsel, he had sought the help of the legal aid bureau to represent him. He had stated in his petition that he had married the respondent wife on 13 April 2005 at the National Registration Department in the district of Sg Siput. He was 31 and she was 24. They lived together in the petitioner's house until January 2013 when the respondent wife moved out.

[3] Three attempts to reconcile the parties by the marriage tribunal failed. According to the petitioner, the respondent had informed him at the initial stage of their marriage that she was not happy to have married the petitioner because the marriage had been arranged by both their parents. However both the parties had tried to work on their marriage as advised by their respective parents. Throughout their marriage they had tried to have a baby but all attempts failed and much expenses were incurred in the process. The defining moment came in January 2013 when the wife decided to leave the home and there ensued a quarrel precipitated by financial problems and by what according to the husband, was the wife's admission that she had another man in her life. He then pleaded those morbid but measured words that 'the marriage has irretrievably broken down and that the respondent's conduct is such that the petitioner cannot be reasonably expected to live with the respondent any longer.'

PRAYERS

[4] The petitioner husband had prayed for the following:

(a) that the marriage registered on 13 April 2005 be dissolved;

(b) that the respondent do pay back the petitioner the sum of RM3,000 being the compensation claimed for the petitioner's payment to the temple for the traditional ceremonial solemnisation of the marriage;

(c) costs; and

(d) further and other reliefs as deem fit by the court.

PROCEEDINGS

[5] On the date fixed for hearing of the petition on 25 June 2014, the respondent attended court and informed the court that she still wanted to live with the petitioner husband. The petitioner husband was also present and was adamant that he had no intention to want to live with the respondent any longer and that he wanted to go through with the divorce. Mr Mah Yut Choy from the Legal Aid Bureau, who appeared for the petitioner, suggested that the Legal Aid Bureau be allowed to mediate the matter.

[6] The court then fixed 6 August 2014 for case management and to appraise itself as to the progress of the mediation. She appeared on that day before the court in open court and so did the petitioner. She appeared alone as she said she could not afford a lawyer. The Legal Aid Bureau, having acted for the impecunious husband, could not act for the indigent wife though we was equally deserving of legal aid. She informed the court that she would be agreeable to and would consent to the divorce if the husband should agree to pay her a reasonable monthly maintenance. The court then stood down the matter at about 9.41am for the parties to discuss what would be a reasonable monthly maintenance.

[7] When the court called up the case again at 10.55am in open court, learned counsel for the petitioner husband from the Legal Aid Bureau, Cik Aiza Ali Raman informed the court that the parties had arrived at an amicable settlement and would like to record a consent order.

[8] The terms were that the petitioner husband had agreed to withdraw prayer (b) above on the claim for the RM3,000 being the expenses for the traditional ceremonial solemnisation of the marriage at the temple and so that prayer was struck out. As agreed by the parties the court granted by consent prayer (a) for dissolution of the marriage and also by consent an order that the petitioner husband shall pay maintenance of RM200 per month to the respondent wife by the last day of each month commencing September 2014 and that the said sum shall be paid into an account given by the wife and that such maintenance payment shall continue until further order of the court or until the respondent wife remarries. The court also ordered the decree nisi to be made absolute in three months.

[9] As agreed by the parties, the court also recorded by consent that the petitioner husband had agreed to return the wife's jewellery to her and that correspondingly the wife also agreed to return the husband his gold chain.

[10] As the respondent wife was not represented, the court was careful to ascertain that she had freely consented to the terms of the consent order and so

the terms were explained in tamil to her by the court's Tamil interpreter Mr Joseph N Nair and the respondent wife once again confirming that she had understood and agreed to the terms of the divorce.

PRINCIPLES

[11] The wife has now instructed her solicitors to file a notice of appeal, appealing against the whole of the consent order on 6 August 2014.

Whether the respondent wife had consented to the terms of the divorce

[12] This petition started off as a contested petition, with the petitioner husband stating as his ground of divorce that the marriage had irretrievably broken down. This is as provided for in s 53 of the Law Reform (Marriage and Divorce) Act 1976 which reads as follows:

> 53 Breakdown of marriage to be sole ground for divorce
>
> (1) Either party to a marriage may petition for a divorce on the ground that *the marriage has irretrievably broken down*.
>
> (2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution. (Emphasis added.)

[13] The parties were nevertheless, at the case management date fixed and heard in open court, finally agreeable to a petition for a dissolution of their marriage and for the ancillary relief of maintenance. Once both the husband and wife have mutually agreed to the divorce, it is not for the court to decide otherwise as to do so would be counter to the free will of the parties who had voluntarily entered into the marriage union, to now voluntarily agree to go for a divorce. It is as if the contested petition has now become an uncontested petition for the dissolution of the marriage by mutual consent and the court hearing the petition uncontested must be satisfied that the consent to the dissolution of the marriage has been freely given by the parties and that proper provision is being made for the wife; there being no children in this marriage. See the case of *Ong Ah Mai v Ling Pooi Ming* [1984] 2 MLJ 129.

[14] It is not unlike the requirement of s 52 which provides as follows:

> 52 Dissolution by mutual consent
>
> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied *that both parties freely consent*, and *that proper provision is made for the wife* and *for the support, care and custody of the children, if any, of the marriage*, and

may attach such conditions to the decree of divorce as it thinks fit. (Emphasis added.)

[15] The Supreme Court in *Sivanesan v Shymala* [1986] 1 MLJ 400 at p 402 held that there is no need to state in the joint petition that the marriage has irretrievably broken down. As a corollary, where the respondent to an originally contested petition has agreed to the dissolution of the marriage, there is no necessity for the court to inquire into the sufficiency of the facts showing that the marriage has irretrievably broken down.

[16] Ideally of course the parties should seek counselling and try to resolve their differences for there are no marriages without its fair share of problems and challenges at one time or another. It takes a lifetime to understand the closest possible of all human relationships, that of a husband and a wife. It takes the stability of a home to raise a family. It is only too true that two imperfect persons cannot create a perfect union and if marriages are made in heaven, then they surely must be worked out at home. Whether it be the unmet expectations of the husband expecting the wife not to change after marriage and she did, or the wife expecting the husband to change after marriage and he did not; the fact remains that there will be unmet expectations and with that disappointments.

[17] Here the parties have tried three rounds of reconciliation attempts before the Marriage Tribunal on 4 April 2013, 9 May 2013 and 6 June 2013 and the Marriage Tribunal had failed to reconcile the parties. It is not for want of trying. It is not for want of opportunities to patch up and to move in the same direction together. As has often been said, it takes two hands to clap and two to tango. Even where one party is adamantly wanting a divorce and another of refusing it, it does not prevent a court hearing the petition to grant a divorce, if satisfied on the facts, that the marriage has irretrievably broken down. Of course parties may prefer the middle course of a judicial separation to give space to the parties as they try to sort out their differences but that is not something which the court can impose on the parties.

[18] Even though in a joint petition, the court would fix a date within a month of filing for the hearing, yet if the parties should request time to explore a possible reconciliation, this court would invariably grant it for there is no glory in bringing a marriage to an end and certainly not a case of statistical efficiency and speed. Every attempt should be given to the parties to attempt reconciliation and mediation for it is always a failure of both parties to the marriage when it should end in divorce. So too with a contested petition as in the petition filed herein. The hope of reconciliation has to be balanced with the harsh reality that a marriage has failed and that what is left to be discarded is just the empty shell of it. While there are cases of successfully hoping against hope

and the audacity of hope in what may be a humanly hopeless situation, the court would have to respect the free will and consent of the parties arrived at without any coercion.

[19] Here the court has ascertained that the wife had understood the terms of the divorce and had freely consented to it through the interpretation and explanation of the Tamil interpreter of the court. It does not matter even if she had preferred not to be divorced either because of the stigma that is attached to a divorced woman in her culture or that she thinks she could still live together with her husband eventhough he did not think so and had given up all hope of being able to live together with her. The court was also satisfied that proper provision has been made in the monthly maintenance for the wife by the husband and had recorded the sum agreed by both the husband and the wife.

[20] Here the consent of the wife had been freely granted though she might have preferred not to be divorced if that were possible. The consent decree nisi granted is valid both procedurally and in principle.

Whether the consent order may be appealed against

[21] The position of a consent order in law had been clearly explained in the Federal Court case of *Ganapathy Chettiar v Lum Kum Chum & Ors, Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (FC) where His Lordship Raja Azlan Shah CJM (as His Royal Highness then was) held as follows:

> The answer to the question is obvious and, with respect, is so clearly stated in paragraph 2011 of Volume 2 of either the 1976 or the 1979 Supreme Court Practice that we will merely content ourselves with repeating that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as an estoppel: *Kinch v Walcott* [1929] AC 482. All the more so, in our view, since there is not the slightest question of any mistake as to facts or law Since there had been no mistake on the part of anyone when the consent order for the sale by public auction was made, *the only possible way in which this order could be altered would be by the consent of all the parties*: *Australasian Automatic Weighing Machine Co v Walter* 1891 WN 170. (Emphasis added.)

Further in *Chen Choy & Son Realty Sdn Bhd v Ganesha Ganapathy & Anor* [1987] 2 CLJ 433, Siti Norma Yaakob J (later CJM) observed as follows:

> The order sought to be rescinded by the defendants is a consent order and following the decision of *Ganapathy Chettiar v Lum Chum & Ors* [1981] 2 MLJ 145, that in itself is evidence of a contract between the parties to the order, all the more so, where there is not the slightest question of mistake as to facts or law. It can also be pleaded as an estoppel and the only way the consent order can be rescinded is when the plaintiff agrees to the rescission and since it is objecting to the defendants' application, *the only cause open to the defendants is to file a fresh action against the plaintiff to impeach the consent order.* (Emphasis added.)

[22] See also the case of *Tay Hup Lian v Histyle Sdn Bhd & Anor* [2010] 9 MLJ 569; [2010] 1 LNS 418. If there had been any consent given mistakenly to the divorce on some erroneous facts then it is for her to apply in a fresh action to impeach the consent order. So too if there are terms that she had mistakenly agreed to whether it be the amount of maintenance or the return of his gold chain. An order for maintenance may only be varied if there has been a change in material circumstance. See *Gee Siew Yee v Ann Wam Tiang* [2008] 1 MLJ 754; [2008] 1 CLJ 229.

[23] This is not a case where to allow the consent order to remain would cause substantial injustice to the respondent wife. In the event that it does, then the court may set aside such an order as was held by the Supreme Court in *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761; [1996] 2 CLJ 185.

[24] Perhaps the decision to appeal instead of commencing a fresh suit to impeach the consent decree nisi was inspired by the case of *Liew Wai Kuan v Ong Koh Hou @ Won Kok Fong & Anor* [2000] 7 MLJ 241 at p 244:

> In *Syarikat Mara Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 at p 420, Peh Swee Chin J (as he then was) said:
>
> > To revert to the instant case, the order in question had not been extracted or perfected, but as regards the power of re-considering it, the order in question not being a consent order, what would be actually the nature of such power to be exercised?
>
> This court was much exercised by this problem. In my view, the nature of this power is not a blanket one; it is subject to a restriction which is. To correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order. The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O 20 r 11 of the Rules of the High Court 1980.
>
> To revert to the instant case, *the first respondent is seeking relief to set aside the decree nisi with the view of rehearing the petition, which, on the authority of the aforesaid case, would not be proper. As observed by the learned judge in that case, where the proposed correction to a court order is fundamentally different, the proper remedy would be to lodge an appeal. Further, if the court were to rehear the petition, it would mean that there would be no finality in litigation*. (Emphasis added.)

[25] As this court had consciously and carefully ascertained that the respondent wife had freely consented to the divorce and that she was not labouring under some erroneous fact or misrepresentation when she consented

to the amount of maintenance of RM200 per month and to the return of his gold chain, there is no basis either for setting aside the consent decree nisi or for that matter, an appeal.

Order accordingly.

Reported by Afiq Mohamad Noor